

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ALEX GALINDO AND IRENE  
GALINDO,

Plaintiffs,

v.

BALTIMORE AIRCOIL COMPANY, a  
corporation; CINCINNATI INC.,  
doing business in California as "The  
Cincinnati Shaper Company," a  
corporation; and DOES 1 through 100

Defendants.

) 07-CV-798 LJO-GSA

)  
) ORDER GRANTING PLAINTIFFS' MOTION  
) TO EXCLUDE DEFENDANT'S EXPERT  
) WITNESS

) (Document 33)

On November 5, 2008, Plaintiffs ALEX GALINDO and IRENE GALINDO ("Plaintiffs") filed a Motion to Exclude the Expert Testimony of Peter Barroso Jr., Defendant BALTIMORE AIRCOIL COMPANY's ("Defendant") expert witness. On November 25, 2008, Defendant filed an opposition. Plaintiffs filed a reply on December 3, 2008. The Court considered all of the pleadings in this matter and determined that the matter was suitable for decision without oral argument. Local Rule 78-230(h). The hearing scheduled for December 12, 2008 was vacated. For the reasons that follow, the Court orders that Plaintiffs' Motion to Exclude Defendant's Expert Testimony is GRANTED.

**BACKGROUND**

This is a personal injury action arising out of a December 15, 2004 incident in which

1 Plaintiff ALEX GALINDO allegedly suffered injuries to his left hand when operating a press  
2 brake at a facility owned and operated by Defendant BALTIMORE AIRCOIL COMPANY.  
3 Plaintiffs ALEX GALINDO and IRENE GALINDO brought this action against both Defendants  
4 to recover for ALEX GALINDO'S injuries. Defendant CINCINNATI INCORPORATED was  
5 dismissed as a party on February 28, 2008 pursuant to a settlement agreement. BALTIMORE  
6 AIRCOIL COMPANY is the only remaining Defendant.

7 On November 5, 2008, Plaintiffs filed the instant motion to exclude Defendant's expert  
8 witness from testifying at trial. Plaintiffs argue that a scheduling conference order was issued on  
9 November 20, 2007 which set expert disclosures for October 17, 2008, and supplemental  
10 disclosures for October 28, 2008, respectively. Pursuant to this order, all non-dispositive and  
11 dispositive motions are to be filed no later than January 16, 2009. A pretrial conference is  
12 scheduled for March 19, 2009, and the matter is set for a jury trial to begin on April 20, 2009.  
13 The scheduling order informed the parties that the disclosures should include all the information  
14 set out in Rule 26 of the Federal Rules of Civil Procedure. In relevant part, the order provided as  
15 follows :

16 [Initial and supplement expert witness disclosures] must be made pursuant to F.R.  
17 Civ. P. 26(a)(2)(A) and (B) and shall include all information required thereunder.  
18 In addition, F.R. Civ. P. 26(b)(4) and F.R. Civ. P 26(e) shall specifically apply to  
19 all discovery related to expert witnesses and their opinions included in the  
20 designations. Each expert witness must be prepared to be fully examined on all  
21 subjects and opinions included in the designations. Failure to comply with these  
22 requirements will result in the imposition of sanctions, which may include the  
23 preclusion of testimony or other evidence offered through the expert witness...  
24 Scheduling Conference Order dated Nov. 20, 2008 at pg. 5: 11-18 (Doc. 11) .

25 On August 26, 2008, the parties submitted a stipulation to the Honorable Lawrence J.  
26 O'Neill requesting an amendment to the scheduling order extending the expert disclosures and  
27 supplemental expert disclosures for approximately three months. On September 12, 2008, the  
28 Court declined to amend the scheduling order. In doing so, the Court commented on the  
importance of the scheduling order for purposes of case management and also cautioned that  
scheduling conference orders should not be "disregarded without peril." (Doc. 31).

Plaintiffs timely disclosed the identity of their expert as required pursuant to the Court's

scheduling order. On October 21, 2008, Defendant's counsel contacted Plaintiffs' counsel and spoke with his legal secretary, Lisa Quiroz . Counsel informed Ms. Quiroz that he had received Plaintiffs' disclosures but that Defendant's disclosures had not been sent because of a calendaring error. See, Declaration of Lisa Quiroz dated November 3, 2008.at pg. 2-3. (Doc. 40). Plaintiffs' counsel was not in the office at the time the call was received. On October 28, 2008, after Plaintiffs' counsel had returned to the office, Defendant designated Peter Barroso, Jr. as a defense expert via fax. Attached to the designation was Mr. Barroso's curriculum vitae, his fee schedule, and a list of cases in which he had previously testified. See, Declaration of Douglas Kroesch dated November 25, 2008 at pg. 2. (Doc. 37). The designation however did not contain any expert report outlining Mr. Barroso's opinions, or materials that he relied on. Id. Defendant's counsel sent Plaintiffs' counsel a copy of Mr. Barroso's expert report on November 24, 2008, as soon as it was received from Mr. Barroso. Id.

### **LEGAL STANDARD**

Rule 26(a)(2)(B) provides that "unless stipulated or ordered by the court [the disclosure of the identity of expert witnesses pursuant to Rule 26(a)(2)(A)] must be accompanied by a written report. Fed. R.Civ. P. 26(a)(2)(B). The report shall contain, among other things, a "complete statement of all opinions to be expressed and the basis and reasons for them" and the data or other information considered by the witness in forming the opinions. F.R. Civ. P. 26(a)(2)(B). A party who fails to properly disclose its experts and their reports may be barred from using any of the expert's direct testimony unless there was "substantial justification" for the failure to disclose or the failure was "harmless." Fed. R.Civ.Proc. 37(c)(1).

In determining whether this action should be imposed, the burden is on the party facing the sanction to prove harmlessness. Torres v. City of Los Angeles, No. 06-55817, 2008 WL 4878904 at \* 12 (9<sup>th</sup> Cir. Nov. 13, 2008) (quoting, Yeti by Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9<sup>th</sup> Cir 2001)). The Ninth Circuit Court of Appeals gives wide latitude to a district court's exercise of discretion to issue sanctions for failure to disclose an expert. Yeti, 259 F. 3d at 1106. Moreover, F.R. Civ. P. 16(f) and 27(b)(2)(B) "authorize district courts to prohibit the admission of evidence proffered by the disobedient party." Sylla-Sawdon v.

1 Uniroyal Goodrich Tire Co., 47 F.3d 277, 284 (8<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 822, 116  
 2 S.Ct. 84 (1995); United States v. 68.94 Acres of Land, 918 F.2d 389, 396 (3<sup>rd</sup> Cir. 1990); Smith  
 3 v. Rowe, 761 F.2d 360, 366 (7<sup>th</sup> Cir. 1985). The power of the trial court to exclude exhibits and  
 4 witnesses not disclosed in compliance with discovery and pretrial orders is essential to judicial  
 5 management of the case. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-898  
 6 (8<sup>th</sup> Cir. 1978); Sylla-Sawdon, 47 F.3d at 284. The Ninth Circuit has upheld a district court  
 7 ruling precluding an expert from testifying when the expert was not timely and properly  
 8 disclosed. Jenkins v. Whittaker Corp., 785 F.2d 720, 728 (9<sup>th</sup> Cir.), cert. denied, 479 U.S. 918,  
 9 107 S.Ct. 324 (1986).

10 In considering whether to exclude the expert testimony, the court should consider: (1) the  
 11 explanation, if any, for the failure to disclose; (2) prejudice to the opposing party; (3) the  
 12 potential for curing the breach by granting a continuance; and (4) the importance of the  
 13 testimony. See Barett v. Atlantic Richfield Co. 95 F.3d 375, 380 (5<sup>th</sup> Cir. 1996); Sierra Club  
 14 Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F. 3d 546, 572 (5<sup>th</sup> Cir. 1996); cert. denied,  
 15 519 U.S. 811, 117 S. Ct. 57 (1996).

### 16 DISCUSSION

17 Plaintiffs argue that pursuant to Federal Rule of Civil Procedure 37(c)(1), Defendant's  
 18 expert's testimony should be precluded because Defendant failed to follow the court's orders  
 19 requiring that all expert witnesses be disclosed on or before October 28, 2008. Instead, Plaintiffs  
 20 did not receive Defendant's expert designation until eleven days past the required deadline and  
 21 did not receive Mr. Barroso's expert report until November 24, 2008 which was well beyond the  
 22 expert disclosure and supplemental expert disclosure dates.

23 Defendant argues that the failure to provide the expert disclosure was not caused by  
 24 willfulness or bad faith, but was only due to defense counsel's failure to properly calendar the  
 25 expert disclosure dates. Defendant's counsel contends that he had changed the dates on his  
 26 calendar pursuant to the stipulation and forgot to change them back after the court denied the  
 27 request for the extensions. The report was given to Plaintiffs' counsel as soon as it was  
 28 completed by Mr. Barroso and Defendant's counsel informed opposing counsel that he would do

1 whatever was necessary to remedy the difficulties the oversight caused. Defendant argues that  
2 exclusion of the testimony is an extreme sanction and there is substantial time until the trial to  
3 allow supplemental disclosures by Plaintiffs' expert. Moreover, Plaintiffs' expert will have the  
4 opportunity to consider Mr Barroso's report prior to Plaintiffs deposing Mr. Barroso.

5 In reply, Plaintiffs argue that a calendaring error is not substantial justification.  
6 Furthermore, Plaintiffs argue that they have been prejudiced because Defendant had access to  
7 their expert's report during mediation that occurred on October 29, 2008. This mediation was  
8 unsuccessful and it is impossible to determine the effect having the report may have had the  
9 mediation process. Finally, rather than taking steps to minimize the error such as returning  
10 Plaintiffs' expert report, or limiting the dissemination of the report, Mr. Barroso reviewed  
11 Plaintiff's expert's report prior to formulating his own opinions. Plaintiffs argue it is impossible  
12 to assess the impact that exposure to the Plaintiffs' reports had on the drafting of Mr. Barroso's  
13 report, or on any motions for summary judgment Defendant's counsel has informed Plaintiffs he  
14 will be filing. Thus, Plaintiffs argue that Defendant's failure to timely disclose the expert was not  
15 substantially justified, nor was it harmless.

16 The court has evaluated all of the factors listed above and finds that Mr. Barroso's expert  
17 testimony and opinion based on the report shall be excluded. The parties were clearly informed  
18 in the scheduling order that failure to include information required by F.R. Civ. P. 26(a)(2)(A)  
19 and (B) may result in the Court excluding the testimony or other evidence offered through such  
20 experts. Moreover, the parties also requested an extension of the deadlines which was denied by  
21 Judge O'Neill. The parties were advised again of the importance of the dates set forth in the  
22 scheduling order and were told that scheduling orders should not be disregarded without peril. It  
23 is also noted that although Judge O'Neill denied the extension request, he did so without  
24 prejudice, however, the parties never filed another stipulation to extend the dates.

25 The court is mindful that scheduling errors do occur, however, a calendaring error does  
26 not constitute substantial justification. Moreover, the Court agrees that Defendant's failure to  
27 disclose was not harmless. Plaintiffs have been prejudiced because Defendant's counsel took no  
28 steps to ameliorate the effects of the calendaring error. For example, to date, Defendant's

1 counsel has not filed a motion to extend any of the expert discovery deadlines, nor did he contact  
2 the court as soon as the error was realized in an effort to remedy the situation. Instead, counsel  
3 waited until Plaintiffs filed this motion to give any explanation to the court.

4       Additionally, it is clear from Mr. Barroso's report that he considered Plaintiffs' expert  
5 opinions in formulating his conclusions. See, to Declaration of Douglas A. Kroesch dated  
6 November 25, 2008, at Exhibit 3, para. 1. (Doc. 38). Thus, whether or not it was intentional,  
7 Defendant obtained a tactical advantage when the report was given to Mr. Barroso prior to the  
8 completion of his own report. Furthermore, Defendant also had this report during mediation  
9 which could have effected the outcome of those proceedings. These prejudices cannot be cured  
10 by allowing a continuance.

11       Finally, consistent with his previous orders, Judge O'Neill has indicated that the other  
12 dates, including the motions deadline, the pretrial, and trial dates, will not be continued. Thus,  
13 Plaintiffs will be significantly prejudiced if the supplemental expert discovery deadline is  
14 extended prior to the filing of dispositive motions which is currently scheduled for January 16,  
15 2009. There is simply not enough time to extend the supplemental expert disclosure deadline at  
16 this juncture in the proceedings.

17       The court recognizes the importance of this testimony to Defendant's case, however, the  
18 importance of the testimony cannot override the enforcement of local rules and scheduling  
19 orders. The importance of Defendant's expert merely emphasizes the need for Defendant to have  
20 complied with Judge O'Neill's two previous orders, or at a minimum to have informed the court  
21 of the error when it was recognized, especially given the history of this case. See, Barrett, 95 F.  
22 3d at 381; Wong v. Regents of University of California, 410 F. 3d 1052, 1060 (9<sup>th</sup> Cir. 2005)  
23 (Recognizing that courts routinely set schedules and establish deadlines to foster the efficient  
24 treatment of cases and noting that "Parties must understand that they will pay a price for failure  
25 to comply strictly with scheduling and other orders, and that failure to do so may properly  
26 support severe sanctions and exclusions of evidence."). Accordingly, Defendant has not  
27 demonstrated that the failure to properly disclose the expert report was substantially justified or  
28 harmless.

**CONCLUSION AND ORDER**

For the reasons discussed above, Plaintiffs' Motion to Exclude the Testimony and Opinions of Defendant's Expert, Peter Barroso Jr, is GRANTED.

IT IS SO ORDERED.

**Dated: December 17, 2008**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE